**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **BRADLEY E. ANDERSON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 256,710 |
| **THE BOEING COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the Review and Modification Award of Administrative Law Judge John D. Clark dated May 19, 2006. Claimant was awarded benefits for a 17 percent permanent partial disability based upon her functional impairment, followed by a 62 percent permanent partial general disability. The Appeals Board (Board) heard oral argument on August 18, 2006.

### APPEARANCES

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

### RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Review and Modification Award of the Administrative Law Judge (ALJ). The stipulations contained in the Review and Modification Award list the date of accident as a series from February 24, 2000, and each and every working day through May 1, 2003. The parties, at oral argument to the Board, acknowledged this stipulation. However, the ALJ, in the Review and Modification Award, used February 24, 2000, as the date upon which the award was calculated. This alters the maximum weekly benefit in this award, and adversely impacts the application of the 415-week time limit contained in K.S.A. 44-510e. This calculation error will be corrected in the Board's award.

## ISSUES

1. What is the nature and extent of claimant's disability? Claimant and respondent entered into an agreed running award on May 1, 2003. At that time, claimant was still working for respondent at an accommodated job and earning a comparable wage. After claimant was laid off from respondent on June 13, 2005, claimant's award was modified to a 62 percent permanent partial disability based upon a wage loss of 72 percent and a task loss of 52 percent. Respondent initially argued claimant had not put forth a good faith effort to find post-injury employment and a wage of $400.00 should be imputed. In its oral argument to the Board, respondent acknowledged claimant's involvement in the Trade Adjustment Assistance training program would constitute a good faith effort to obtain work. Respondent also argues that the task loss of Edward J. Prostic, M.D., is the more credible, claiming a permanent partial disability of 35 percent is proper. Claimant argues a 100 percent wage loss is proper in this instance, claiming a permanent partial whole body disability of 76 percent should be awarded.

2. The ALJ used June 13, 2005, as the effective date for the modification of the award. The parties agreed that claimant's last day worked was May 27, 2005. But claimant was paid regular wages until June 13, 2005. Thus the delay in beginning the modified award. Respondent argued that the award should be delayed until October 7, 2005, as claimant was paid severance pay to that date.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Review and Modification Award of the ALJ should be modified to award claimant a permanent partial general disability of 51 percent based upon a task loss of 33 percent and a wage loss of 69 percent.

Claimant had been an employee of respondent since October 22, 1985. Claimant began experiencing problems in his upper extremities, including his shoulders, in February 2000. His problems culminated on May 1, 2003. Thereafter, claimant and respondent entered into an agreed running award based upon a 17 percent permanent partial general disability for the injuries suffered. Claimant continued working for respondent at an accommodated job, earning a comparable wage, until May 27, 2005, at which time he was laid off. Claimant was paid his regular wages until June 13, 2005. Claimant then filed for review and modification of the agreed award.

Claimant applied for unemployment and tried to find work after his layoff, but was unsuccessful. After approximately two months searching for a job, claimant entered a training program with Trade Adjustment Assistance (TAA). This program, set up with the assistance of respondent, trains workers who have lost their jobs as a result of jobs being moved out of the country or because of imports coming in from foreign countries. During this training, claimant is paid $359.00 per week and is not required to look for a job. His job is to "get through your training, get it completed and go out and be a tax-paying citizen."[1] Margaret "Peggy" Hill, a trade act coordinator for the Kansas Department of Commerce, testified in this matter. Ms. Hill noted the distinction between unemployment, where a person is required to look for work, and TAA, where a person is not. At the time of the regular hearing, claimant was continuing in the program. Claimant testified he would be in this program for approximately 3 years.

Claimant was referred to board certified neurological surgeon Paul S. Stein, M.D., by the ALJ for an independent medical examination on September 5, 2002. Dr. Stein was not asked to reexamine claimant after the layoff. Dr. Stein was provided a copy of a task analysis performed by vocational expert Jerry Hardin. After reviewing the task list, Dr. Stein opined that claimant had lost the ability to perform 13 of 25 tasks, for a 52 percent task loss.

Claimant was referred to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination. This examination, done at the request of respondent, was performed on March 3, 2006. Dr. Prostic opined that claimant's condition had not changed or worsened since the accident. However, Dr. Prostic acknowledged that his restrictions at the time of the examination were significantly different than those imposed on claimant by Dr. Stein in 2002. Dr. Prostic was provided with the task list prepared by vocational expert Monty Longacre. After reviewing this task list, Dr. Prostic opined that claimant was incapable of performing 3 of 22 tasks, for a 14 percent task loss.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

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[1] Hill Depo. at 16.

[2] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 44-528, the review and modification statute, allows for a modification of an award if,

> . . . the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished . . . .[4]

Here, the Board finds claimant's work disability has increased as a result of the layoff. Therefore, a modification of the award is proper. Claimant is entitled to a permanent partial general disability under K.S.A. 44-510e, which states:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

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[4] K.S.A. 44-528(a).

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

Here, claimant acknowledges that he only searched for a job for about two months. After that, claimant entered a training program with TAA. This program was requested by respondent and will last for about 3 years. Claimant is discouraged from looking for work during this time and is paid a weekly benefit of $359.00. Claimant and respondent disagree on the effect of this weekly benefit. Claimant argues it is similar to unemployment and not to be considered as a wage for the purposes of K.S.A. 44-510e. Respondent sees this as training money and argues it should be considered as income and imputed for the purposes of the wage loss prong of K.S.A. 44-510e.

Respondent agrees that claimant's enrollment in the TAA program is a good faith effort. The dispute herein is how to treat the weekly benefit being paid claimant while he is in the program. It is generally acknowledged that unemployment benefits are excluded from inclusion in wage computation.[8] However, the benefits being paid to claimant are not exactly in the nature of unemployment benefits. As noted by Ms. Hill, with unemployment, a claimant is required to look for a job. Here, claimant is discouraged from looking for a job and is expected to concentrate on the training.

The question of how to apply these training funds is a question of first impression in Kansas. The issue has, however, been addressed in other jurisdictions. In *Woods*,[9] a $90.00-a-month subsistence allowance paid by the government for on-the-job training under the G.I. Bill of Rights was included in the average weekly wage. Likewise, in *Grant*, a $44.00-a-month allowance paid to a trainee in an Office of Economic Opportunity program was included in the average weekly wage.[10]

Here, the Board finds claimant's economic benefit derived from the training program to be analogous to wages for training purposes, rather than unemployment. The Board, therefore, finds the funds paid to claimant are "earnings" and are to be used in computing claimant's actual wage loss under K.S.A. 44-510e. In comparing claimant's weekly benefit of $359.00 to the average weekly wage on the date of claimant's injury of $1,146.80, the Board finds claimant has suffered a wage loss of 69 percent. The record indicates that these weekly benefits may not be paid for the entire time claimant is in the training. If the weekly benefit amount changes during the training period, review and modification under K.S.A. 44-528 is available to the parties.

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[8] 5 *Larson's Workers' Compensation Law* § 93.01[2][b] (2005).

[9] *Wood Mercantile Co. v. Cole*, 213 Ark. 68, 209 SW.2d 290 (1948); noted, 61 Harv. L. Rev. 1467 (1948); *see also* 5 *Larson's Workers' Compensation Law* § 93.01[2][b] (2005).

[10] *Grant v. Blazer Coordinating Council*, 111 N.J. Super. 125, 267 A.2d 568 (1970), *modified on other grounds*, 116 N.J. Super. 460, 282 A.2d 769 (1971); *see also* 5 *Larson's Workers' Compensation Law* § 93.01[2][b] (2005).

The Board must next consider the task loss suffered by claimant. Both Dr. Stein and Dr. Prostic gave opinions regarding claimant's task loss. The Board finds no persuasive reason to give greater weight to one opinion over that of the other. Therefore, in averaging the two, the Board finds claimant to have suffered a task loss of 33 percent. In averaging the wage loss and task loss amounts, the Board finds claimant to have suffered a permanent partial general disability of 51 percent.

Respondent argues the award of work disability benefits should not be effective until the severance pay period ends in October 2005. However, this record does not explain whether this benefit was funded by monies from respondent or claimant. Without additional information regarding the source of these funds, the Board will not consider these funds as wages for the purpose of this award.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge John D. Clark dated May 19, 2006, should be, and is hereby, modified to award claimant a 51 percent permanent partial general disability for the injuries suffered through May 1, 2003, and based upon an average weekly wage of $1,146.80 as of June 13, 2005. This modification of the award shall be effective on June 13, 2005.

Claimant is entitled to 22.89 weeks of temporary total disability compensation at the statutory maximum rate of $432 per week totaling $9,888.48, followed by 69.21 weeks at the statutory maximum rate of $432 per week totaling $29,898.72 for a 17 percent permanent partial disability, followed by 138.42 weeks at the statutory maximum rate of $432 per week totaling $59,797.44 for a 51 percent permanent partial disability, making a total award of $99,584.64.

As of October 4, 2006, there is due and owing claimant 22.89 weeks of temporary total disability compensation at the statutory maximum rate of $432 per week totaling $9,888.48, followed by 137.64 weeks of permanent partial disability compensation at the statutory maximum rate of $432 per week in the sum of $59,460.48, for a total of $69,348.96, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $30,235.68 is to be paid for 69.99 weeks at the statutory maximum rate of $432 per week, until fully paid or further order of the Director.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel

desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[11]

**IT IS SO ORDERED.**

Dated this ____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

## DISSENT

In their submission letter to Judge Clark, respondent and its insurance carrier characterize the benefits that claimant receives for participating in the Trade Adjustment Assistance program as unemployment benefits.[12] The undersigned Board Members agree, as those benefits are being paid due to claimant's unemployment. Accordingly, we respectfully disagree with the majority using those unemployment benefits as claimant's post-injury wages for purposes of the permanent partial general disability formula set forth in K.S.A. 44-510e. We believe this is the first instance the Board has treated unemployment benefits as post-injury wages, which we believe is contrary to statute and case law.

Permanent partial general disability is determined by averaging a worker's task loss and wage loss. And a worker's wage loss is determined by comparing the worker's pre-injury and post-injury wages. K.S.A. 44-510e provides:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent**

[11] K.S.A. 44-536a(b).

[12] Respondent's Submission Letter (May 18, 2006) at 1.

> **of permanent partial general disability shall be the extent**, expressed as a percentage, to which **the employee**, in the opinion of the physician, **has lost the ability to perform the work tasks** that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, **averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The term "wages" is not defined by K.S.A. 44-510e. But K.S.A. 2002 Supp. 44-511(a)(3) defines "wage" as the total of the money and additional compensation that a worker receives for services rendered. The key is "for services rendered." Consequently, we believe the explicit language of the Workers Compensation Act precludes using the benefits in question as post-injury wages, whether they be characterized as some sort of training benefits or some other type of unemployment benefit.

In past cases, this Board has followed *Knelson*[13] in rejecting an employer's argument that severance pay should be considered post-injury wages. In the severance pay cases, the Board held:

> The Board concludes the monies [severance pay] should not be treated as either retirement or unearned wages. . . . Absent express statutory mandate to the contrary, the employer is not entitled to credit for payments to claimant under a legal obligation outside the Workers Compensation Act.[14]

*Knelson* and the severance pay cases dealt with an employer's request for a credit for payment of purported wages. But the principle is the same. Accordingly,

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[13] *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

[14] *Boyer v. Binney & Smith, Inc.*, No. 228,897, 2000 WL 759338 (Kan. WCAB May 31, 2000). See also *Wohlford v. Bombardier Aerospace/Learjet*, No. 1,021,347, 2006 WL 1933441 (Kan. WCAB June 30, 2006).

unemployment benefits should not be treated as post-injury wages for purposes of either a credit or for the wage loss prong of the permanent disability formula.

At first glance it may appear equitable to treat claimant's unemployment benefits as post-injury wages to reduce his permanent disability benefits. Those feelings of equity, however, are tempered when one considers that Kansas' injured workers already receive some of the lowest workers compensation benefits in the nation. And, in this instance, it should be noted claimant's average weekly wage working for respondent was $1,146.80 per week but the maximum weekly benefit claimant can receive under the Workers Compensation Act is $432 per week. Consequently, assuming claimant simultaneously received the $359 per week in unemployment benefits and $432 per week in workers compensation benefits, he would still be receiving 31 percent less than his pre-injury wages.

This Board need not further reduce an injured worker's benefits through a strained interpretation of the Act. Conversely, respondent and its insurance carrier's remedy lies with the legislature.

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge